

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGACIANO GONZALES-MENDOZA,

Petitioner,

vs.

RICHARD MORGAN,

Respondent.

NO. CV-05-5065-CI

REPORT AND RECOMMENDATION TO
DISMISS PETITION AND TO DENY
PENDING MOTIONS AS MOOT

BEFORE THE COURT are Petitioner's Response to the Order to Show Cause (Ct. Rec. 4) and his Motion to Appoint Counsel (Ct. Rec. 5). Petitioner is proceeding *pro se*; Respondent has not been served. The parties have not consented to proceed before a United States Magistrate Judge. The documents were considered without oral argument.

By Order filed July 15, 2005, the court directed Petitioner to show cause why his petition should not be dismissed as time-barred under 28 U.S.C. § 2244(d) of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). In response, Petitioner asserts he was not informed until August 2004, of the decision of the Indeterminate Sentence Review Board ("ISRB") to deny him parole and to add 60 months to his prison term. Petitioner initially pleaded guilty to two counts

1 of First Degree Murder in Benton County in 1983, and was sentenced to
2 life imprisonment with the possibility of parole.

3 Petitioner claims the ISRB did not immediately inform Petitioner
4 of their decision in February 2002, but mailed their deferred decision
5 to him several months later. Petitioner contends, because of his
6 illiteracy and the failure of the prison to translate the document for
7 him, he was unable to ascertain the content of that decision until an
8 altruistic inmate read it to him in August 2004.

9 Unfortunately, a prisoner's illiteracy does not excuse his
10 failure to timely file documents with the court. *See Hughes v. Idaho*
11 *State Board of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986)
12 (concluding petitioner's illiteracy did not constitute sufficient
13 cause to excuse procedural default). Furthermore, his contention that
14 he was unable to find another prisoner who would not demand sexual
15 favors in exchange for translating the document, or that prison staff
16 would not translate his documents free of charge, does not excuse the
17 two year delay before he filed his petitions. *See id.* (a prisoner's
18 illiteracy and complete lack of legal assistance in prison do not
19 constitute cause for a procedural default). Petitioner does not state
20 he sought assistance from his counselor and was refused, or that he
21 grieved such a refusal. *See Calderon v. United States Dist. Court*,
22 128 F.3d 1283, 1289 (9th Cir. 1997)(holding the tolling of the AEDPA's
23 statute of limitations due to extraordinary circumstances requires
24 that a petitioner diligently pursue his claims), *overruled in part on*
25 *other grounds by Calderon v. United States Dist. Court*, 163 F.3d 530,
26 540 (9th Cir. 1998) (*en banc*).

1 Finally, Petitioner asserts he is mildly retarded and his
2 retardation should toll the limitations period under the AEDPA.
3 Petitioner does not argue he is mentally incompetent as claimed by the
4 petitioner in *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).
5 Furthermore, contrary to Petitioner's assertion, the Psychological
6 Evaluation he presents as an exhibit, (Ct. Rec. 4, Appendix IV, pgs.
7 10 and 12), states Petitioner's intelligence is estimated to be within
8 the normal range.

9 Petitioner has failed to demonstrate extraordinary circumstances
10 beyond his control which made timely filing impossible. See *Miles v.*
11 *Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). Accordingly, **IT IS**
12 **RECOMMENDED** the petition be **DISMISSED with prejudice** as time-barred
13 under 28 U.S.C. § 2244(d). **IT IS FURTHER RECOMMENDED** pending motions
14 be denied as moot.

15 OBJECTIONS

16 Any party may object to a magistrate judge's proposed findings,
17 recommendations or report within ten (10) days following service with
18 a copy thereof. Such party shall file with the District Court
19 Executive all written objections, specifically identifying the
20 portions to which objection is being made, and the basis therefor.
21 Attention is directed to Fed. R. Civ. P. 6(e), which adds another
22 three (3) days from the date of mailing if service is by mail.

23 A district judge will make a *de novo* determination of those
24 portions to which objection is made and may accept, reject, or modify
25 the magistrate judge's determination. The district judge need not
26 conduct a new hearing or hear arguments and may consider the
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1 magistrate judge's record and make an independent determination
2 thereon. The district judge may also receive further evidence or
3 recommit the matter to the magistrate judge with instructions. See 28
4 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73, and LMR 4, Local
5 Rules for the Eastern District of Washington. A magistrate judge's
6 recommendation cannot be appealed to a court of appeals; only the
7 district judge's order or judgment can be appealed.

8 The District Court Executive is directed to enter this Report and
9 Recommendation and forward a copy to Petitioner.

10 DATED August 18, 2005.

11
12 S/ CYNTHIA IMBROGNO
13 UNITED STATES MAGISTRATE JUDGE
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